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No. 00-1928

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IN THE

Supreme Court of the United States

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The United States (Respondent) maintains that this Court should not grant certiorari to review the consistent misapplication of the *Lockhart v. Fretwell*, 506 U.S. 364 (1993) standard in the military simply because the lower court "disclaimed" that misapplication. Brief in Opposition (BIO) 12 n.2. In addition, Respondent asserts that the United States Court of Appeals for the Armed Forces (C.A.A.F.) lacked jurisdiction to "reconsider" its opinion without recalling the mandate and that the lower court allegedly did not "purport" to recall the mandate. BIO at 9-10. Respondent is incorrect in all respects.

I. This Court should grant certiorari to review the consistent misapplication of the *Lockhart v. Fretwell*, 506 U.S. 364 (1993) standard in the military, especially in light of the lower court's "disclaimer" that *Lockhart* has been misapplied in the military, which is contrary to the clear evidence before this Court.

Respondent asserts that this Court should not grant certiorari to review the consistent misapplication of the *Lockhart v. Fretwell*, 506 U.S. 364 (1993) standard in the military simply because the lower court "disclaimed" that it had suggested in *Loving*, Petition App. at 228a, that *Lockhart* modified *Strickland v. Washington*, 466 U.S. 668 (1984). Respondent is incorrect. The lower court's disclaimer is, however, clearly contradicted by its initial decision in this case. *See* Petition at 4. Moreover, this disclaimer is in clear conflict with the lower court's discussion of *Loving* in other cases. For example, in *United States v. Scott*, 51 M.J. 326 (C.A.A.F. 1999) (citations omitted), the court stated, "As recognized in *United States v. Loving*, this Court has adopted the further clarification of *Strickland* by *Lockhart v. Fretwell* . . . ," that an applicant alleging prejudice from ineffective assistance of counsel must show that he was deprived of a fair trial, and that the trial's result was not reliable. *See also United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996) (affirming death

sentence) ("As recognized in *United States v. Loving*, this Court has adopted the further clarification of *Strickland* by *Lockhart v. Fretwell* . . ." (citation omitted)). The court has cited to *Lockhart* to conclude that "the Supreme Court has recognized that '[s]heer outcome determination[ ] . . . was not sufficient to make out a claim under the Sixth Amendment.'" *United States v. Gray*, 51 M.J. 1, 26 (C.A.A.F. 1999) (alteration in original) (affirming death sentence); *see also Curtis*, 44 M.J. at 119.

Finally, Respondent asserts that the lower court's reliance on *Lockhart* only affected two of Petitioner's ineffective assistance of counsel claims. BIO at 9. This also is not the case. While the lower court cited *Lockhart* only in addressing those two issues, all of Petitioner's ineffective assistance of counsel claims involved the same deficient and erroneous Sixth Amendment analysis. *See* Petition App. at 30a-53a. Indeed, this situation is similar to the problem in *Williams v. Taylor*, 529 U.S. 362, 397 (2000), where the Virginia Supreme Court at times cited the appropriate standard and at times cited the *Lockhart* standard. Under these circumstances, this Court held that reversal was required. Likewise, in Petitioner's case, the lower court's expressed improper reliance on *Lockhart* as somehow modifying the *Strickland* standard for several claims reveals that this improper standard affected all of Petitioner's Sixth Amendment claims.

II. The United States Court of Appeals for the Armed Forces had jurisdiction to reconsider its prior opinion without recalling the mandate.

Respondent asserts that the lower court had no jurisdiction to reconsider its prior opinion without recalling the mandate. BIO at 8. In making this assertion, Respondent relies on the Federal Rules of Appellate Procedure and attempts to apply those rules to the military. Respondent is incorrect in

attempting to apply the Federal Rules to the United States Court of Appeals for the Armed Forces.

First, the military is a separate jurisdiction with separate laws and special regard as a separate society entitled to different treatment. *United States v. Weiss*, 510 U.S. 163, 174 (1994) ("the military in important respects remains a 'specialized society separate from civilian society'") (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Part of that separate treatment is separate appellate rules.

While the Federal Rule on Petitions for Rehearing does not contemplate the filing or granting of an out of time petition, *see* F.R.A.P. 40, the C.A.A.F. rule on Petitions for Reconsideration specifically contemplates and allows petitions for reconsideration out of time when leave is granted by the court. C.A.A.F. Rule 31(e).

Moreover, unlike the body of law developed around the Federal Rules that finds that the appellate court lacks jurisdiction in the case after the mandate is issued, there is no such law concerning military cases or the jurisdiction of the Court of Appeals for the Armed Forces. Indeed, the only cases found in which C.A.A.F. felt the need to recall the mandate was when clarification of the mandate was required. *See United States v. Heyward*, 22 M.J. 274 (C.M.A. 1986) (Daily Journal); *United States v. Silva*, 22 M.J. 118 (C.M.A. 1986) (Daily Journal); *United States v. Weeks*, 21 M.J. 93 (C.M.A. 1985) (Daily Journal); *United States v. Belz*, 20 M.J. 325 (C.M.A. 1985) (Daily Journal).

In other instances, the C.A.A.F. has fairly routinely granted petitions for reconsideration out of time after the mandate was issued without mention of recalling the mandate. For example, C.A.A.F. has in some instances granted the motion for leave to file the petition for reconsideration out of time and granted reconsideration. *See, e.g., United States v. Maher*, 54 M.J. 344

(C.A.A.F. 2000) (Daily Journal) (reconsideration granted out of time and case remanded to the Air Force Court for further review); *United States v. Delacruz*, 50 M.J. 334 (C.A.A.F. 1998) (Daily Journal) (reconsideration granted out of time and prior order vacated); *United States v. Rosario*, 49 M.J. 169 (C.A.A.F. 1998) (Daily Journal) (reconsideration granted out of time and court ordered record returned for further review); *United States v. Lyons*, 37 M.J. 188 (C.M.A. 1993) (Daily Journal) (reconsideration out of time granted and prior order vacated); *United States v. Collins*, 37 M.J. 81 (C.M.A. 1992) (Daily Journal) (reconsideration out of time granted and case remanded to the Air Force Court). The Court has even specifically stated in some instances that petitions for reconsideration out of time would be accepted depending on subsequent contrary rulings by this Court. *See, e.g., United States v. Schneider*, 36 M.J. 364 (C.M.A. 1993).

The lower court has also in many instances granted leave to file the petition for reconsideration out of time, but then denied reconsideration. *See, e.g., United States v. Raiford*, 52 M.J. 462 (C.A.A.F. 1999) (Daily Journal); *United States v. Naseerudden*, 49 M.J. 431 (C.A.A.F. 1998) (Daily Journal); *United States v. Fletcher*, 48 M.J. 23 (C.A.A.F. 1997) (Daily Journal); *United States v. Nichols*, 43 M.J. 459 (C.A.A.F. 1996) (Daily Journal); *United States v. Eddy*, 43 M.J. 406 (C.A.A.F. 1995) (Daily Journal); *United States v. Foley*, 39 M.J. 391 (C.M.A. 1994) (Daily Journal).[1] Reconsideration out of time - following issuance of the mandate - has been granted in circumstances where no petition for writ of certiorari was filed in this Court following a prior ruling by C.A.A.F. *See, e.g., United States v. Ayala*, 43 M.J. 425 (C.A.A.F. 1995) (Daily Journal) (reconsidering 43 M.J. 296 (C.A.A.F. 1995)); *United*

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[1] This list is not exhaustive. Numerous other similar rulings from C.A.A.F. can be found.

States v. Causey, 39 M.J. 15 (C.M.A. 1993) (Daily Journal) (reconsidering 37 M.J. 308 (C.M.A. 1993)). The lower court has also, in at least one other case, granted leave to file the petition for reconsideration out of time following review and denial of the petition for writ of certiorari to this Court. *See United States v. Scott*, 55 M.J. 55 (C.A.A.F. 2001) (prior decision 51 M.J. 326 (C.A.A.F. 1999), *cert. denied*, 529 U.S. 1075 (2000)).

The reason that C.A.A.F. follows this particular procedure is apparent in 10 U.S.C. § 867a(a), which provides, in relevant part, that this Court "may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." Clearly, the reason C.A.A.F. would grant a motion for leave to file a petition for reconsideration out of time but then deny the petition for reconsideration is in order to allow this Court to review the case rather than to deprive this Court of jurisdiction as Respondent asserts.

III. Even assuming that the Court of Appeals for the Armed Forces was required to recall its mandate, the grant of Petitioner's "Motion for Leave to File Petition For Reconsideration Out of Time" implicitly recalled the mandate.

While Petitioner did not caption his motion as a motion to recall the mandate, the lower court was free to construe the motion as a motion to recall the mandate. *See, e.g., United States v. Skandier*, 125 F.3d 178 (3rd Cir. 1997) (construing "motion for reconsideration and reinstatement" as motion to recall the mandate and granting the motion to recall because of subsequent contrary ruling by this Court); *Ute Indian Tribe of the Unintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997) (construing District Court's request for clarifying instructions as an invitation to recall the mandate and

ordering that mandate be recalled following subsequent contrary ruling by this Court); *Carpenter v. Reed ex rel. Dept. of Public Safety*, 757 F.2d 218 (10th Cir. 1985) (construing motion for rehearing as motion to recall the mandate and granting the motion to recall).

In addition, the lower court's order "granting" the motion for leave to file out of time includes an implicit order recalling the mandate. *See generally, X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999) (District Court's refusal to grant qualified-immunity motion without further discovery was premised on implicit finding that the complaint alleged a constitutional claim on which relief could be granted); *Ruiz v. Blentech Corporation*, 89 F.3d 320 (7th Cir. 1990) (District Court's grant of motion for default judgment included implicit assessment of damages requested by plaintiff in the complaint).

Finally, this Court's opinion in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998) does not control in determining the propriety of the lower court's implicit recall of the mandate. Specifically, in *Thompson*, this Court was addressing the very narrow circumstances of a court of appeals *sua sponte* recalling the mandate based on "procedural misunderstandings by some judges," *id.* at 548, but waiting over five months after the alleged misunderstanding to recall the mandate after the state court had issued an intervening opinion denying relief and an execution date was scheduled, *id.* at 551. Moreover, because *Thompson* had been sentenced in state court, this Court also had to measure the *sua sponte* recall of the mandate "against the statutory and jurisprudential limits applicable in habeas corpus cases," *id.* at 553, including the "significant limits on the discretion of federal courts to grant habeas relief," *id.* at 554-55. Thus, the Court in *Thompson* rendered a narrow holding:

> we hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence.

Id. at 558.

The Court of Appeals for the Armed Forces was not acting *sua sponte*. It acted on Petitioner's motion. Although Respondent failed to file a response to the motion, Respondent could have done so. Nonetheless, Respondent failed to respond to the merits or to assert the hyper-technical arguments it makes before this Court. Likewise, this case does not involve a sentence imposed by state courts or the narrow confines of habeas corpus relief.

This case does, however, involve exceptional circumstances that warranted recall of the mandate. Specifically, this Court's holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Glover v. United States*, 531 U.S. 198 (2001), which are contrary to the lower court's earlier decision, make these circumstances exceptional. *See, e.g., Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (recall appropriate where a subsequent Supreme Court decision reveals that the initial decision was incorrect); *United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993) (mandate recalled because of subsequent contrary ruling by the United States Supreme Court); *United States v. Torcasio*, 993 F.2d 368 (4th Cir. 1993) (same).

In determining whether the mandate should be recalled, "the inquiry must center on whether the applicant will suffer irreparable injury and whether the applicant has a reasonable probability of succeeding on the merits" in a petition to the United States Supreme Court. *Nevius*, 105 F.3d at 456. As

discussed in the Petition, this burden has clearly been met. Thus, the lower court committed no error in granting leave to file out of time and implicitly recalling the mandate.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Armed Forces. Alternatively, the lower court's judgment should be summarily reversed.

Respectfully submitted,

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